STATE OF MICHIGAN

COURT OF APPEALS

CHARLENE J. HANSON,

Plaintiff-Appellant,

v

CENTRAL SAVINGS BANK,

Defendant-Appellee

and

RICHARD F. HANSON,

Defendant.

UNPUBLISHED
March 27, 2007

No. 272708
Chippewa Circuit Court
LC No. 04-007269-CH

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this appeal of the lower court's disposition in this action to establish priority of a judgment lien acquired through plaintiff's consent judgment of divorce, after remand from this Court, plaintiff appeals as of right the trial court's order granting defendant Central Savings Bank's (CSB's) motion for summary disposition and denying plaintiff's countermotion for summary disposition. Plaintiff argues that: (1) the trial court erroneously held that the circumstances evidence an intent by defendants to renew, rather than to cancel, the original mortgage obligation owed to CSB; (2) the trial court erroneously stated that the parties agree that there are no undisputed issues of material fact; and (3) the trial court erroneously failed to determine whether a subsequent loan by CSB was a future advance secured by an earlier mortgage. We affirm.

On June 20, 2000, CSB loaned defendant Richard F. Hanson (Richard) $394,518.75, as evidenced by a note. Also on June 20, 2000, as security, Richard gave CSB a mortgage on real property located at 7283 E. Neebish Ferry Rd., Barbeau, Michigan ("the property"). This mortgage was recorded with the Chippewa county register of deeds on June 23, 2000.

On April 6, 2001, Grand Traverse circuit court entered a consent judgment of divorce for plaintiff and Richard. The judgment ordered Richard to pay plaintiff alimony-in-gross.

On July 24, 2001, CSB loaned Richard an additional $200,100, as evidenced by a note of the same date. This July 24, 2001, note is stamped "RENEWED" by CSB. On September 18,

2001, Richard executed another note for $200,150.00 (the same amount as the July 24, 2001, note but with a $50 note fee added).

On September 28, 2001, Grand Traverse circuit court entered an "Order re: Plaintiff's Motion to Enforce Consent Judgment of Divorce Dated April 16, 2001." This order required Richard to make certain monetary payments to plaintiff. This order provided: "The entire alimony in gross amount due to Plaintiff per the terms of the Consent Judgment of Divorce, in the aggregate amount of . . . ($166,942.74) is immediately accelerated and due in its entirety[.]" On October 15, 2001, the consent judgment of divorce, and the September 28, 2001, Grand Traverse circuit court order, were recorded with the Chippewa county register of deeds.

On April 16, 2002, Richard executed a note to CSB in the amount of $587,256.17, secured by a mortgage on the property executed on the same date. The April 16, 2002, mortgage was recorded on April 17, 2002. The April 16, 2002, mortgage states: "THIS IS A SECOND MORTGAGE AND JUNIOR TO THAT MORTGAGE RECORDED IN LIBER 802 PAGE 85 JUNE 23, 2000, CHIPPEWA COUNTY RECORDS[.]"

Beginning in January 2004, CSB foreclosed on its June 2000 mortgage. Plaintiff commenced this action in February 2004, asserting one count for judicial foreclosure of her judgment lien. CSB filed a motion for summary disposition, which the trial court granted. This Court reversed, holding that summary disposition was premature because discovery had not closed. *Hanson v Central Savings Bank*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2005 (Docket No. 254658).

On remand, after the close of discovery, CSB renewed its motion for summary disposition, and plaintiff filed a countermotion for summary disposition. The trial court again granted summary disposition to CSB.

Plaintiff first argues that the trial court erred when it concluded that the circumstances evidence an intent by defendants to renew, rather than to cancel, the June 2000 loan and mortgage. We disagree.

This Court reviews de novo a trial court's grant or denial of summary disposition. *McManamon v Redford Twp*, 256 Mich App 603, 610; 671 NW2d 56 (2003). Statutory construction is a question of law that we also review de novo. *Twichel v MIC Gen Ins Corp*, 469 Mich. 524, 528; 676 NW2d 616 (2004).

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rely on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings,

affidavits, depositions, admissions, and other documentary evidence filed in the action. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Such materials are considered only to the extent that they are admissible. MCR 2.116(G)(6).

Michigan is a race-notice state under the Michigan real property recording act, MCL 565.1 *et seq*. MCL 565.25(4) provides:

> (4) The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded land owner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrances shall be subject to the perfected liens, rights or interests.* [Emphasis added.]

Thus, a recorded mortgage serves as notice, and all subsequent interests or encumbrances take subject to previously-perfected liens and interests. MCL 565.25(4); *Piech v Beaty*, 298 Mich 535, 538; 299 NW 705 (1941). MCL 565.29 provides, in pertinent part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

Thus, a *subsequent* interest holder may take priority over a *previously*-conveyed interest only where the subsequent interest holder takes "in good faith" *and* records first.[1] This is the meaning of "race-notice."

Here, first, CSB's first mortgage was recorded in June 2000, putting plaintiff on record notice. MCL 565.25(4). Second, plaintiff's judgment lien was not recorded until October 2001. Thus, plaintiff was on notice of CSB's encumbrance, and plaintiff recorded later; under race-notice, CSB's June 2000 mortgage takes priority over plaintiff's encumbrance. MCL 565.25(4).

Plaintiff argues that CSB satisfied the debt secured by the June 2000 mortgage when that debt was paid with the proceeds of the April 2002 loan. But plaintiff fails to cite any authority in its brief on appeal, to guide this Court in deciding which encumbrance has priority. While plaintiff argues that a case cited by CSB, *Thorpe Finance Corp of Wisconsin v Ken Hodgins & Sons*, 73 Mich App 428; 251 NW2d 614 (1977), is distinguishable,[2] plaintiff cites no case which

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[1] A "conveyance" is "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned." MCL 565.35. "A good faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan National Bank v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

[2] *Thorpe Financial Corp of Wisconsin* is not distinguishable on its facts. Plaintiff's only argument in this regard is that "[i]n *Thorpe*, the original note was marked 'renewed' and the 1974 note made specific reference to the 1971 agreement." This argument lacks merit. Here, even though the June 2000 note was not marked renewed, it was not marked paid or cancelled either. And CSB's April 2002 mortgage also made specific reference to its first (June 2000) mortgage, not unlike the situation in *Thorpe Financial Corp of Wisconsin*. Finally, even if

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should instead govern which encumbrance has priority. Plaintiff merely argues, factually, regarding the evidence of defendants' intent. By arguing regarding defendants' intent, plaintiff tacitly admits that the rule stated in *Thorpe Finance Corp of Wisconsin* applies (see below).

The general rule concerning competing interests in real property is "first in time, first in right." *Cheboygan Co Constr Code Dep't v Burke*, 148 Mich App 56, 59; 384 NW2d 77 (1985). In other words, a security interest filed first prevails over a security interest filed second (or, third, or fourth, etc.). This is merely a different way of expressing the rule contained in the second sentence of MCL 565.25(4) ("*All subsequent owners or encumbrances shall be subject to the* (previously) *perfected liens, rights or interests*" (emphasis added)).

Plaintiff argues that upon payment of the debt represented by the Note dated June 20, 2000, the mortgage of that same date should have been discharged by CSB pursuant to MCL 565.41. This argument lacks merit.

MCL 565.41 provides:

> (1) Within the applicable time period in section 44(2) *after a mortgage has been paid or otherwise satisfied, the mortgagee* or the personal representative, successor, or assign of the mortgagee *shall prepare a discharge of the mortgage, file the discharge* with the register of deeds for the county where the mortgaged property is located, and pay the fee for recording the discharge.
>
> (2) If a discharge of mortgage received by a register of deeds under subsection (1) is not recorded on the day it is received, the register of deeds shall place on or attach to the discharge, by means of a stamp, electronically, or otherwise, the date the discharge is received. The date placed on or attached to the discharge under this subsection is prima facie evidence of the date the discharge was filed with the register of deeds. [Emphases added.]

"Shall" is mandatory. *American Federation of State, Co and Muni Employees v City of Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

However, this statute does not give plaintiff's October 2001 judgment lien priority over CSB's June 2000 mortgage, because plaintiff does not demonstrate that the June 2000 note was paid. CSB's second mortgage, of April 2002, was clearly marked a second mortgage, evidencing an intent not to discharge the first CSB mortgage of June 2000. The second CSB mortgage states: "THIS IS A SECOND MORTGAGE AND JUNIOR TO THAT MORTGAGE RECORDED IN LIBER 802 PAGE 8 JUNE 5, 2000." Thus, the evidence contained in the April 2002 mortgage indicates an intent by CSB and Richard not to discharge the first CSB (June 2000) mortgage, but to keep it in place.

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Thorpe Financial Corp of Wisconsin were distinguishable, plaintiff does not cite any decisional authority that would instead apply.

"Michigan case law has held that acceptance of a renewal note is not regarded as payment of a preexisting note or obligation, in the absence of a novation or express agreement to the contrary." *Thorpe Finance Corp of Wisconsin, supra* at 431 (internal quotation marks and citations omitted). "A renewal note does constitute payment of the original obligation where such was the intent of the parties and such intention may be proved by circumstances such as acts or conduct by the parties, as well as by direct evidence of an express promise or agreement." *Id*. (citation omitted). The evidence indicates that the April 2002 note was a renewal note.[3] Thus, the April 2002 loan did not discharge the June 2000 obligation, unless the parties to the renewal note intended the April 2002 note to pay the June 2000 note. *Id*.

CSB and Richard clearly did not intend the April 2002 note and mortgage to cancel the June 2000 note and mortgage. The June 2000 note was not marked paid or cancelled. And the April 2002 mortgage expressly states that it is a second mortgage, and junior to the June 2000 mortgage. As just noted, Meister testified that the June 2000 loan and October 2001 loan were renewed by the April 2002 loan. And Meister also testified that the June 2000 debt had not been repaid. Richard's testimony is in agreement with Meister's. In his affidavit, Richard stated: "That the June 20, 2000[,] loan and the July 24, 2001[,] loan were renewed April 16, 2002." Richard also testified in his affidavit that he had not repaid the money borrowed in June 2000 or July 2001, and "[t]hat it was not my understanding or intent that the renewal of my debt on April 16, 2002[,] would pay off my loan of June 20, 2000[,] or my loan of July 24, 2001." Finally, Richard testified that "it was not my understanding or intent that the renewal of my debt on April 16, 2002[,] would discharge the mortgage I gave on June 20, 2000." Because CSB's loan and mortgage of April 2002 did not cancel, discharge or pay-off the original June 2000 loan, CSB did not have a duty to file a discharge of the June 2000 mortgage. MCL 565.41(1).

The trial court correctly held that defendants intended the April 2002 loan to renew, rather than to cancel, the June 2000 obligation. Under Michigan's race-notice statute, the June 2000 mortgage has priority over plaintiff's judgment lien. MCL 565.25(4) (second sentence). The June 2000 mortgage was recorded first, and plaintiff was on record notice of the June 2000 mortgage. 565.25(4). As a result, the trial court correctly held that CSB's June 2000 mortgage has priority over plaintiff's October 2001 judgment lien.

Plaintiff next argues that the trial court erred in finding that the parties agree that there is no genuine issue of material fact. We disagree.

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[3] CSB president Ronald Meister testified by affidavit that the June 2000 loan and October 2001 loan were renewed by the April 2002 loan. And Meister also testified that the June 2000 debt had not been repaid. Richard's testimony is in agreement with Meister's. In his affidavit, Richard stated: "That the June 20, 2000[,] loan and the July 24, 2001[,] loan were renewed April 16, 2002." Richard also testified in his affidavit that he had not repaid the money borrowed in June 2000 or July 2001, and "[t]hat it was not my understanding or intent that the renewal of my debt on April 16, 2002[,] would pay off my loan of June 20, 2000[,] or my loan of July 24, 2001." Finally, Richard testified that "it was not my understanding or intent that the renewal of my debt on April 16, 2002[,] would discharge the mortgage I gave on June 20, 2000."

Plaintiff filed a countermotion for summary disposition under MCR 2.116(C)(10), and expressly argued that there was no genuine issue of material fact. Because both parties filed motions for summary disposition below arguing that there were no genuine issues of material fact, the trial court did not err in finding that there were no genuine issues of material fact.

Finally, plaintiff argues that the trial court erred in failing to determine whether the April 2002 loan was a future advance secured by the June 2000 mortgage. Again, we disagree.

Plaintiff argues that the issue of priority can be determined by deciding whether the June 2000 mortgage secured the later April 2002 note (whether the April 2002 note was a future advance secured by the June 2000 mortgage). Plaintiff cites MCL 565.901, which provides:

> (a) "Future advance" means an indebtedness or other obligation that is secured by a mortgage and arises or is incurred after the mortgage has been recorded, whether or not the future advance was obligatory or optional on the part of the mortgagee.
>
> (b) "Future advance mortgage" means a mortgage that secures a future advance and is recorded either prior to or after the effective date of this act. If a recorded mortgage is amended to secure, expressly and not by implication, a future advance arising after the amendment, the mortgage becomes a future advance mortgage at the time the amendment is recorded.

Plaintiff also cites MCL 565.902, which provides: "Except as otherwise provided by this act, a future advance mortgage securing a future advance shall have priority with respect to the future advance as if the future advance was made at the time the future advance mortgage was recorded."

Plaintiff argues that the April 2002 loan was not a future advance secured by the June 2000 mortgage. The June 2000 mortgage states that future advances "SHALL BE SECURED BY THIS MORTGAGE WHEN EVIDENCED BY PROMISSORY NOTES STATING THAT SAID NOTES ARE SECURED HEREBY." Plaintiff argues that the April 2002 note contains no indication that it is secured by the June 2000 mortgage.

While plaintiff's argument is true enough, as far as it goes, it does not prove that plaintiff's judgment lien has priority over CSB's June 2000 mortgage. The issue of priority between the June 2000 mortgage and plaintiff's judgment lien cannot be determined by deciding whether the April 2002 loan was secured by the June 2000 mortgage. CSB's foreclosure was only of its June 2000 mortgage. Therefore it is irrelevant whether the April 2002 loan was a future advance secured by the June 2000 mortgage.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder